IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Habiban vs. Mehboob Ali & ors.

S.B. Civil Misc. Appeal No.17/2004 against the judgment and order dated 13.12.2003 passed by the learned District Judge, Bikaner in Civil Appeal Decree No.62/2003.

Date of Judgment: March 14th, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. Manoj Bhandari, for the appellant.
Mr. Sajjan Singh ,for the respondents.

REPORTABLE

BY THE COURT:

The matter has come up for hearing before this Court in view of the directions issued by the Hon'ble Apex Court in Civil Appeal No.4138/2006 arising out of S.L.P.(C.) No.21215/2005 decided on 14.9.2006 by which the Hon'ble Apex Court directed this Court to re-hear the present Misc. Appeal and decide the issue whether the first appellate court could have allowed the application filed under Order VI Rule 17 C.P.C. and permitted the defendants-tenants to take a plea relating to non-termination of tenancy by the landlord by serving notice under Section 106 of the Transfer of Property Act in the light of the decision of the Hon'ble Apex Court in the case of Jaswant Raj Soni vs.

Prakash Mal ((2005) 8 SCC 38) by keeping in view the principles set out in paragraphs 5 and 6 of the aforesaid judgment of Jaswant Raj Soni's case.

Brief facts of the case are that the plaintiff-appellant Habiban filed suit for eviction of the tenants-respondents in the trial court on 24.9.1996. The plaintiff sought eviction of the defendants-tenants from the suit premises on the grounds of default in payment of rent, personal bona fide necessity of the suit premises for the landlord's son, on the ground of alteration in the suit premises by the tenants and further for causing nuisance by the tenants in the suit premises. Before the trial court, the defendants contested the suit but did not take plea of non-maintainability of the suit on the ground of want of notice either under Section 106 of the Transfer of Property Act or as per the condition of tenancy incorporated in the rent deed which provided for a notice by the landlord to the tenant of one month before he could ask the tenant to vacate the suit premises. Since there was no defence of the defendants before the trial court, therefore, no issue was framed about necessity of notice by the landlord to the tenants and consequently there is no decision on question of fact whether any notice was necessary for maintaining the suit for eviction of the tenants.

On merits, the trial court held that the tenants have committed default in payment of rent before the suit for eviction on the ground of

default was filed by the landlord and further held that the tenants since have not paid the rent during pendency of the suit, therefore, the tenants are not entitled to benefit under Section 13(6) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 which provides that in case of first default in payment of rent as provided under sub-clauses (a) of sub-section (1) of Section 13 of the Act of 1950, the tenant shall have opportunity to pay rent as determined by the court and in case the tenant continued to deposit the rent month by month within the stipulated period then the court shall not pass decree for eviction on the ground of first default. As stated above, the trial court held that the tenants failed to deposit the rent after its determination by the trial court, therefore, the tenants are not entitled to protection under the provisions of the Act of 1050. The trial court decided the issue of personal necessity of the landlord for the suit premises in favour of the landlord. The plaintiff failed to prove his ground of material alteration by the tenants in the suit premises and further the plaintiff failed to prove the allegation of causing nuisance by the defendants in the suit premises. In view of the above findings, the trial court decreed the suit for eviction against the tenants on the ground of default and personal bona fide necessity by judgment and decree dated 22.4.2003.

The tenants preferred appeal against the judgment and decree dated 22.4.2003. Before the appellate court, the tenants submitted an

application under Order VI Rule 17, C.P.C. and stated that since the copy of the rent deed dated 1.12.1993 submitted by the plaintiff along with the plaint was not legible, therefore, they could not take a defence on the ground of condition mentioned in the rent deed which provides that the tenants shall be entitled to notice of one month before they may be evicted from the rented premises. The landlord submitted that the condition in the lease deed of notice relied upon by the tenants was in the knowledge of the tenants before they filed the written statement and, therefore, after such inordinate delay, the tenants cannot be permitted to take such a plea. It was also contended that in view of the law laid down by the Hon'ble Apex Court in the case of V. Dhanpal Chettiar v. Yesodai Ammal ((1979) 4 SCC 214), the plea taken by the defendants-tenants is legally nos sustainable, as notice is not required.

The first appellate court after observing that in view of the judgment of the Hon'ble Apex Court delivered in the case of V.Dhanpal Chettiar's case (supra), giving of notice under Section 106 of the Transfer of Property Act is not mandatory for maintaining the suit for eviction of the tenant but in view of the judgment of this Court delivered in the case of Prakash Mal & ors vs. Jaswant Raj Soni (rLW 2000(2) Raj. 1227), the suit for eviction of tenant may be filed without giving notice under Section 106 of the Transfer of Property Act but if there is a condition in the rent deed of notice to the tenant then such

notice is necessary. The first appellate court, in view of the said view on the point of law, after rejecting landlord's objection about delay in moving the application under Order VI Rule 17, C.P.C., allowed the amendment application by order dated 13.12.2003 and permitted the tenants to amend the written statement to take a plea on the ground of non-maintainability of suit for want of notice as provided under the condition of lease.

Against the order dated 13.12.2003 allowing the application under Order VI Rule 17,C.P.C. of the defendants-tenants, the landlord preferred present S.B.Civil Misc. Appeal No.17/2004 which was allowed by this Court vide order dated 30.8.2005 on the ground that the decision of Prakash Mal vs. Jaswant Raj Soni, referred above, was reversed by the Division Bench of this Court in the case of Fateh Lal Dak v. Sheshmal (2002(2) CDR 1686 (Raj.) .

Aggrieved against the order of this Court dated 30.8.2005, Special Leave Petition No.21215/2005 was submitted by the tenants before the Hon'ble Apex Court wherein leave was granted and ultimately, the appeal was allowed by the order of the Apex Court dated 14.9.2006.

Before Hon'ble Apex Court, it was pointed out that Jaswant Raj Soni vs. Prakash Mal's case (supra) came up for consideration of the Hon'ble Apex Court and the Hon'ble Apex Court considered the issue of

requirement of serving notice by the landlord upon the tenants in paras 5 and 6 of the said judgment. Paras 5 and 6 of the judgments of the Supreme Court in the case of Jaswant Raj Soni v. Prakash Mal are as under:-

> "5. In the second case the requirement as per the rent notice is : " on being asked to vacate and ... on being told to do so " thus, there is no requirement of a written notice before the institution of an eviction petition. The case of the landlord in the plaint is that he had intimated to the tenant to vacate the premises before institution of the eviction petition. Of course, the tenant denied the same in the written statement. Whether this condition was actually fulfilled or not is a question of fact to be decided by the trial court. The counsel for the parties informed that the case has not gone for trial. Therefore, so far as the second case is concerned, the trial court will decide the issue after allowing the parties to lead evidence with respect thereto. Therefore, the eviction suit must proceed to trial and final decision.
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> 6. The learned counsel for the respondents-tenants tried to argue that in view of Section 28 of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950, the provisions of Section 106 of the Transfer of Property Act will apply to the facts of the present case and a notice to quit in terms of the said provision was required to be given. In view of V.Dhanpal's case (supra) we are unable to accept this argument. There is no legal or statutory requirement for a notice being given in the facts of the present case. The

> only requirement regarding notice, if at all, arises from the condition printed on the back of the rent receipt which in our view cannot be said to be an agreement between the parties laing down requirement for issuance of a notice for institution of an eviction petition. In any case as noticed above, the landlords have tried to meet that requirement. In Jaswant Raj Soni's case the requirement of notice has been met, as observed by us above, while in Jabar Lal case the trial court will consider whether the requirement has been met on basis of evidence led by the parties."

Though the Hon'ble Apex Court in its order dated 14.9.2006 observed that " the only controversy involved in this appeal is whether the first Appellate Court could have allowed the application filed under Order VI Rule 17 C.P.C. and permitted the defendants-tenants to take a plea relating to non-termination of tenancy by the landlord by serving notice under Section 106 of the Transfer of Property Act (in short 'the T.P. Act'). But it is clear from the order of the Apex Court dated 14.9.2006 itself that Hon'ble Apex Court directed this Court to decide the question whether the appellate court could have allowed the application filed under Order VI Rule 17 C.P.C. and permitted the defendants-tenants to take a plea relating to non-termination of tenancy by the landlord by serving notice as provided under the lease agreement between the landlord and the tenants and that is clear from the direction of the Apex Court whereby the Apex Court directed this Court to decide the said question by keeping in view the principles set

out in paras 5 and 6 of Jaswant Raj Soni's case(supra) decided by the Apex Court.

So far as requirement of notice under Section 106 of the Transfer of Property Act for filing the suit for eviction of the tenants where the Rent Acts are applicable, the constitutional Bench of the Hon'ble Supreme Court in V. Dhanpal Chettiar case (supra) already declared that notice to quit under Section 106 Transfer of Property Act is not necessary prerequisite for a eviction petition under any of the statutory Acts. The Supreme Court in V. Dhanpal Chettiar's case (supra) considered all the State Acts including the decision of Shanbhooram v. Mangal Singh (AIR 1959 Raj. 59) of Rajasthan where the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 was the Rent Act, was in force and is applicable to present case. The Supreme Court noticed the difference of opinion which according to the Supreme Court, cropped up because of some observations of the Supreme Court in some decisions and thereafter, held as under:-

> "It was so on an erroneous assumption, if we may say so with great respect, that the difference in the phraseology of the different State Rent Acts justified this difference of views. In our considered judgment on the question of a requirement of a notice under Section 106 of the Transfer of Property Act there is no scope for taking different views on the basis of the difference in the phraseology of the various Rent Acts. In this regard the

> difference in the language does not bring about any distinction. In all the States the law should be uniform, viz. That either a notice is necessary or it is not."

The Hon'ble the Apex Court thereafter held that "to lay down a uniform law for the governance of the whole country and not permit the unjustified different trend of decisions to continue", larger Bench of the Supreme Court has been constituted and therefore, the larger Bench of the Apex Court had decided the said important point of law and for application of uniform law throughout the country in the matter of filing of suit by the landlord against the tenant and to lay down whether service of notice under Section 106 of the Transfer of Property Act is necessary in the light of enactment of various Rent Acts in different States. It will be beneficial to notice that not only the requirement of notice under Section 106 of the Transfer of Property Act was considered by the Hon'ble Apex Court in V.Dhanpal Chettiar's case(supra) but the Hon'ble Apex Court also considered the requirement of determination of contractual tenancy before institution of suit for eviction by the landlord against the tenant. Since it is not in dispute that after the decision of V.Dhanpal Chettiar case(supra) by the Apex Court, as back as in the year 1979, notice to quit under Section 106 of the Transfer of Property Act,1882 is not necessary prerequisite for eviction petition under any of the State Rent Acts, therefore, the learned counsel for the respondents-tenants also did not contend that the termination of

tenancy under Section 106 of the Transfer of Property Act before institution of present suit was necessary and because of non-compliance of this requirement, the suit of the plaintiff-landlord against the defendant-tenant is not maintainable. The defendants-tenants in their application seeking amendment in the written statement, also prayed that in the light of condition mentioned in the rent deed dated 1.12.1973 of service of notice of one month upon the tenants, the landlord could have sought eviction of the tenants by filing suit only after serving such notice and since such notice has not been given to the tenants, therefore, the suit is not maintainable. In view of the above factual position, the question is whether the landlord is required to serve a notice upon the tenants if there is a condition in the lease deed of serving a notice upon the tenants and that condition is condition precedent for maintaining the suit for eviction of the tenants.

In V. Dhanpal Chettiar's case (supra), the Supreme Court noticed the Section 10 of the Tamil Nadu Rent Act which says “a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or Sections 14 to 16.” Hon'ble the Apex Court held that “in other words if a case is made out for his eviction in accordance with the provisions aforesaid, he can be evicted.” The Supreme Court, thereafter held as under:-

> “Even after the termination of the contractual tenancy under the definition of the landlord in clause (6)

> and of the tenant under clause (8) of Section 2 the landlord remains a landlord and the tenant remains a tenant as clause (8) expressly says that tenant means “a person continuing in possession after the termination of the tenancy in his favour”. Section 3 indicated that no landlord can treat the building to have become vacant by merely terminating the contractual tenancy as the tenant still lawfully continues in possession of the premises. The tenancy actually terminates on the passing of the order or decree for eviction and the building falls vacant by his actual eviction. The giving of the notice, therefore, is a merely surplusage and unlike the law under the Transfer of Property Act. It does not entitle the landlord to evict the tenant.”

The same is the position in the State of Rajasthan where the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 was in force and applicable to the present case. As provided in Section 10 of the Tamil Nadu Rent Act, in Section 13(1) of the Rajasthan Rent Act of 1950, it is provided that “Notwithstanding anything contained in any law or contract, no Court shall pas any decree; or make any order, in favour of a landlord, whether in execution of a decree or otherwise, evicting the tenant so long as he is ready and willing to pay the rent therefor to the full extent allowable by this Act, unless it is satisfied - .....”. In the light of the decision of the V.Dhanpal Chettiar's case(supra), if a case is made out for tenant's eviction in accordance with the provisions of sub-clauses (a) to (i) of sub-section (1) of Section 13 of the Act of 1950, the

tenant can be evicted. As in the Tamil Nadu Rent Act, the position of tenant in Rajasthan Rent Act, whose tenancy stands terminated and he continued in possession after termination of his tenancy, he remains tenant as per the definition of tenant given in clause (vii) of Section 3 of the Act of 1950 and consequently, the landlord remains landlord of such tenant whose tenancy has been terminated. The status of tenant comes to an end on passing a decree for eviction after service of notice under Section 106 of the Transfer of Property Act or after service of notice upon the tenant in terms of the condition mentioned in the lease contract, the tenant remains tenant and the landlord remains landlord till the decree for eviction is passed by the court under the provisions of the Act of 1950. The Apex Court clearly held as quoted above, that the giving of notice is a mere surplusage and unlike the law under the Transfer of Property Act and it does not entitle the landlord to evict the tenant. In view of the above reason and binding decision of the constitutional Bench of the Apex Court, requirement of giving of notice even when there is a contract for giving notice by the landlord to tenant, cannot be enforced against the landlord for maintaining the suit for eviction of the tenant.

It is said that the Rent Acts are beneficial legislation, beneficial to tenant and intended to restrict the rights which the landlord possessed either for charging excessive rents or for evicting the tenant

in support of condition that by agreeing for giving notice to the tenant for his eviction, the landlord consciously gave more benefit to the tenant and, therefore, this Court in Prakash Mal and others vs. Jaswant Raj Soni (Single Bench decision of this Court) rightly held that the clause (service of notice) cannot be said to be illegal as the parties to the contract with open eyes agreed, as in the present case, they agreed that the landlord will be entitled to eviction only after giving a notice for the period mentioned in the contract. This view cannot be accepted because of the reason that the Hon'ble Apex Court in V.Dhanpal Chettiar's case (supra) considered this aspect of the matter in para 11 and held that under the Rent Control Acts it becomes an unnecessary technicality to insist that the landlord must determine the contractual tenancy and further held that it is of no practical use after so many restrictions of his right to evict the tenant have been put. The Supreme Court also held that the restricted area under the various State Rent Acts has done away to a large extent with the requirement of the law of contract and the Transfer of Property Act and further held that if this be so why unnecessarily, illogically and unjustifiably a formality of terminating the contractual lease should be insisted upon ? In para 6 of the same judgment, the Apex Court held that once the liability to be evicted is incurred by the tenant, he cannot turn round and say that the contractual lease has not been determined. The action of the landlord

in instituting a suit for eviction on the ground mentioned in any State Rent Act will be tantamount to an expression of his intention that he does not want the tenant to continue as his lessee and the jural relationship of lessor and lessee will come to an end on the passing of an order or a decree for eviction.

The learned counsel for the respondents tried to point out distinction between the contractual tenant and statutory tenant, for which the Hon'ble Apex Court has observed as under:-

> "In many cases the distinction between the contractual tenant and a statutory tenant was alluded to for the purpose of elucidating some particular aspects which cropped up in a particular case. That led to the criticism of that expression in some of the decisions. Without detaining ourselves on this aspect of the matter by any elaborate discussion, in our opinion it will suffice to say that the various State Rent Control Acts make a serious encroachment in the field of freedom of contract. It does not permit the landlord to snap his relationship with the tenant merely by his act of serving a notice to quit on him. In spite of the notice, the law says that he continues to be a tenant and he does so enjoying all the rights of a lessee and is at the same time deemed to be under all the liabilities such as payment of rent, etc. In accordance with the law."

Therefore, it is clear that there cannot be distinction between contractual tenant and statutory tenant where Rent Act is applicable,

like the Act of 1950 in the State of Rajasthan and, therefore, the tenant cannot take plea that he is entitled to notice from the landlord because that is condition mentioned in the lease contract. The Single Bench judgment of this Court delivered in the case of Prakash Mal vs. Jaswant Raj Soni (RLW 2000(2) Raj. 1227) stands overruled by the judgment of this Court delivered in the case of Fateh Lal Dak v. Sheshmal (2002(2) CDR 1686(Raj.). The Division Bench of this Court following the decision of V. Dhanpal Chettiar's case held that "the termination of tenancy without giving notice before filing the suit is not necessary and the decree for eviction etc. Can be sought for even if there is an agreement for notice."

The case of Jaswant Raj Soni(supra) though was considered by the Division Bench of this Court in Fateh Lal Dak's case and was overruled by the Division Bench of this Court vide judgment dated 18.2.2002. Jaswant Raj Soni's case itself came up for consideration of the Supreme Court which was decided on 19.9.2005. The Division Bench judgment of this Court was not brought to the notice of the Supreme Court when the Supreme Court decided Jaswant Raj Soni's case by judgment dated 19.9.2005 (2005(8) SCC 38). It appears from the case of Jaswant Raj Soni's case, as decided by the Apex Court that in fact whether the service of notice before institution of suit by the landlord when there is a condition in the lease deed of giving notice by landlord to the tenant

then whether such condition is a necessary condition precedent for maintaining the suit for eviction against the tenant, as such was not the issue. In Jaswant Raj Soni's case decided by the Hon'ble Supreme Court, two matters; one of Jaswant Raj Soni and another of Jabar Lal, were under consideration before the Supreme Court. In Jaswant Raj Soni's case, the tenant was served notice dated 9.10.1991 by the landlord. By this notice, the tenancy was terminated by the landlord w.e.f. 31.10.1991. In the said notice the landlord though terminated the tenancy by the end of month, yet the landlord informed the tenant that if he takes time in vacating the premises after the said date, he would have to pay the double rent for the extra period. The Hon'ble Apex Court observed that by that the tenant was being allowed to stay beyond 31.10.1991. Eviction petition was instituted on 20.2.1992 which is more than a month after service of notice on the tenant. Noticing these facts, the Hon'ble Supreme Court observed the requirement of service of notice, even if it is to be read in the facts of the present case, can only mean that a thirty days' advance notice was required to be served on the tenant before he is asked to vacate the premises in his occupation. The Hon'ble Supreme Court held that alleged condition regarding notice is very loosely worded and it does not have the technicalities of a notice under Section 106 of the Transfer of Property Act. In the facts of the case, the Hon'ble Supreme Court found that a

notice was served upon the tenant before institution of eviction petition. The eviction petition has been instituted after more than month after service of notice in Jaswant Raj Soni's case, therefore, in Jaswant Raj Soni's case, requirement of notice has been met. At the cost of repetition, it may be observed that in Jaswant Raj Soni's case, the requirement of notice as a necessary condition precedent of maintaining the suit for eviction of the tenant, was not the issue contested by the parties nor it was decided by the Hon'ble Supreme Court.

From para 5 of the judgment of the Supreme Court delivered in the case of Jaswant Raj Soni vs. Prakash Mal and Jabar Mal and Kan Mal, it is clear that the Supreme Court noticed the condition in the rent note- “on being asked to vacate ..... on being told to do so” and thereafter held that “it is not the requirement of written notice before institution of the eviction petition.” Since there was case of the landlord that the landlord intimated the tenant to vacate the premises before the institution of the eviction petition and that fact has been denied by the tenant in the written statement, then the Hon'ble Supreme Court held that whether this condition was actually fulfilled or not is a question of fact to be decided by the trial court. In these circumstances, the Hon'ble Supreme Court held that the trial court will decide the issue after allowing the parties to lead evidence with respect

thereto.

In para 6 of the same judgment, the Hon'ble Supreme Court after rejecting the contention of the tenant based on necessity of service of notice under Section 106 of the Transfer of Property Act, observed that "..... The only requirement regarding notice, if at all, arises from the conditions printed on the back of the rent receipt." On the facts of the said case Hon'ble the Supreme Court observed that the printed condition on the back of rent receipt cannot be said to be an agreement between the parties laying down requirement for issuance of a notice for institution of an eviction petition. That was also a decision on question of fact. In totality, in both the cases, the question whether the notice before institution of the suit for eviction of the tenant by the landlord is a necessary condition precedent when it is a condition incorporated in the lease agreement itself, was not the issue nor it has been decided by the Supreme Court in the case of Jaswant Raj Soni v. Prakash Mal (2005(8) SCC 28). The issue already stands decided by the judgment of the Hon'ble Supreme Court delivered in the case of V.Dhanpal Chettiar(supra) as well as by the Division Bench of this Court delivered in the case of Fateh Lal Dak (supra). The decision of the Division Bench of this Court given in Faten Lal Dak is based on the constitutional Bench decision of the Hon'ble Supreme Court delivered in the case of V.Dhanpal Chettiar and in Jaswant Raj Soni's case, the

Hon'ble Supreme Court has not held that where there is a condition in the lease deed of giving notice to the tenant for his eviction, then the notice is necessary condition precedent for maintaining the suit.

Apart from above, Jaswant Raj Soni's case of the Supreme Court is helpful in holding that technicalities of notice under Section 106 of the Transfer of Property Act is different then the technicalities of notice by contract between the parties which depends upon the wordings of the condition. The requirement of notice may be a written notice or a verbal notice to the tenant. It may provide for period for vacating the suit premises and may not provide so. The condition may also provide that the landlord shall not be entitled to sue for eviction of the tenant without notice in writing. Firstly in view of V. Dhanpal Chettiar's case, that condition in the notice cannot be enforced against maintaining the suit by the landlord without service of notice in terms of the contract between the landlord and tenant as that condition is not enforceable where the tenant has protection under the provisions of the Rent Control Act and secondly, by incorporating condition of notice in the rent deed, for institution of the suit, the landlord cannot be deprived of his right to evict the tenant when law provides that the landlord shall be entitled to decree for eviction if he satisfies the court that the grounds for eviction of tenant as provided under the Rent Act, specifically in the present case, the grounds mentioned in sub-clauses (a) to (i) of sub-

section (1 of Section 13 of the Act of 1950 exist. Thirdly, if there is a condition in rent deed, giving some time to tenant to vacate the suit premises or the landlord is required to give notice to the tenant by giving some time in the notice for vacating the suit premises then also that condition can only be given effect to provide time to the tenant to vacate the suit premises depending upon facts of each case and as held by the Apex Court in V.Dhanpal Chettiar's case(supra), instituting a suit for eviction on the ground mentioned in any State Rent Act will be tantamount to an expression of his intention that he does not want the tenant to continue as his lessee.

Apart from above, I do not find any reason from the impugned order allowing the amendment of the written statement which can justify the amendment in the written statement at appellate stage. The reason for not taking ground in the written statement or before the trial court about non-termination of tenancy is concerned, no sufficient cause has been disclosed by the defendants and flimsy plea taken by the defendants that they could not read the rent deed, cannot be a ground for allowing the amendment at appellate stage. In view of the above, the amendment sought by the defendants-respondents was absolutely unnecessary amendment and, therefore, the first appellate court committed error of law by allowing the amendment application of the tenants-respondents-defendants.

In view of the above discussion, the appeal of the appellant is allowed and the order of the first appellate court 13.12.2003 is set aside. The first appellate court is requested to decide the appeal expeditiously within a period of two months from the date of receipt of copy of this order.

(**PRAKASH TATIA),J.**

mlt.